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JAMES H. McKENN

NO. 159.

In the Supreme Court of the United States

OCTOBER TERM, 1906.

D. S. OSBORNE, ET AL., TRUSTEES OF CARRICK ACADEMY,
Plaintiffs in Error,

vs.

R. A. CLARK, AND WINCHESTER NORMAL COLLEGE,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

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Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

REPLY TO THE MOTION TO DISMISS AND ARGUMENT FOR DEFENDANTS IN ERROR.

May it please the Court:

We will first reply to the—

MOTION TO DISMISS.

It is insisted that no Federal questions were made by the plaintiffs in error in the Supreme Court of the State, either in the pleadings or in argument, as shown by the opinion of the Supreme Court.

We insist that two distinct Federal questions were raised, both in the pleadings and argument:

First—That the charter granted by the State of Tennessee to the Trustees of Carrick Academy created a contract, and that the rights of plaintiff in error under its charter were impaired by virtue of the Act of 1881, authorizing the lease of this property to Winchester Normal College.

Second—That the Act of Congress of 1806, ceding public lands to the State of Tennessee created a trust in favor of an academy in each county of the State, to be thereafter brought into being, and that the rights of plaintiff in error arising under this Act were destroyed by the lease complained of, which was made pursuant to the Act of 1881 of the General Assembly of the State of Tennessee.

We will discuss these propositions in the order stated.

The Federal question as to the impairment of the obligation of the contract was sufficiently raised in the pleadings.

The bill set out at length the history of the creation of this corporation, and the fact that it was chartered by an Act of the General Assembly of the State of Tennessee, and that it acquired the property described in the bill after its incorporation, and after it had perfected an organization under its charter, and that afterwards, in 1881, the Legislature passed the Act complained of, authorizing the lease complained of. The bill then charges that this Act authorizing the lease was void for several reasons, one of which was as follows:

> "Because said Act undertook to authorize the Trustees of Carrick Academy to appropriate its property to the use of another."
>
> (R. pp. 8-13).

It will be noticed that the substance of this bill is that complainant corporation's rights arose by virtue of the Act of Congress, and that it was duly incorporated by the charter

granted from the State, and that it was organized thereunder, and acquired the property in controversy; and that the State of Tennessee attempted by the Act of 1881, complained of, to authorize a diversion of this fund from the purposes for which the corporation was created.

The defendants demurred, and that cause of demurrer which was sustained by the Supreme Court, reads as follows:

> "Because the said lease of 1881 was, as is specifically shown in the bill, expressly authorized by Act of the legislature."
>
> (R. pp. 16-17.)

Thus the issue raised by the pleadings and decided by the Court was, whether the State of Tennessee had authority to authorize the diversion of this fund from the purposes of the corporation and for which it was organized.

True, the Federal Constitution was not mentioned in the bill. But it is manifest that the Federal question was raised. when the bill attacked the Act because it undertook to authorize the trustees to appropriate the corporation's property to the use of another.

It was raised by the demurrer, in which it was insisted that the General Assembly of Tennessee had a right to authorize a diversion of this fund.

In Columbia Water Power Co. vs. Columbia Elec. Street Ry., Light & Power Co., 172 U. S. page 474, the Federal Constitution was not mentioned either in the pleadings or in the opinion of the Supreme Court of South Carolina. But this Court held that a Federal question was raised, because the bill set up a contract, and the answer set up and relied upon a subsequent act of the Legislature of that State, which complainants insisted was in conflict with its rights under its contract set up in its complaint. And this subsequent legislation was given effect and sustained by the Supreme Court of South Carolina. This Court held that this, in itself, raised

a Federal question. That is to say, when the **facts** stated in the pleadings or appearing in the opinion of the Court showed a case where contract rights have been impaired by subsequent legislation of the State, the Federal question arises from these facts, notwithstanding the Federal Constitution was not mentioned, either in the pleadings or in the opinion of the Court.

In McCullough vs. Commonwealth of Va., 172 U. S. 104, this same question was considered by this Court and very elaborately discussed and the same conclusion reached.

And among other things, the Court said:

> "Suppose for illustration, a State Legislature should pass an act, exempting the property of a particular corporation from all taxation; and that a subsequent Legislature should pass an act, subjecting that corporation to the taxes imposed by the city in which its property was located, and that on the first presentation to the highest Court of the State of the question of the validity of the taxes levied under and by virtue of this last act, that the Court should, in terms, hold these city taxes valid notwithstanding the general clause of exemption found in the prior statute. In that event, no one would question that this Court had jurisdiction to review such judgment and inquire as to the scope of the contract of exemption created by the first statute. Suppose, further, that this Court should hold that the first statute was valid and broad enough to exempt from all taxation, city as well as state, and adjudge the last act of the Legislature void as in conflict with the prior; and that thereafter the city should again attempt to levy taxes upon the corporation, and that upon a challenge of those taxes the State Court should say nothing in respect to the last act, but simply rule that the original act exempting the property of the corporation from taxation was void, could it fairly be held that this Court was without jurisdiction to review that judgment, a judgment which directly and necessarily operated to give force and effect to the last statute subjecting the property to city taxes? Could it be said that the silence of the State Court in its opinion

changed the scope and effect of the decision? In other words, can it be that the mere language in which the State Court phrases its opinion takes from or adds to the jurisdiction of this Court to review its judgment? Such a construction would always place it in the power of a State Court to determine our jurisdiction. Such certainly has not been the understanding, and such certainly would seem to set at naught the purpose of the Federal Constitution to prevent a State from nullifying by its legislation a contract which it has made or authorized to be made."

And again:

"Now it is one of the duties cast upon this Court by the Constitution and laws of the United States, to inquire whether a State has passed any law impairing the obligation of a prior contract. No duty is more solemn and imperative than this, and it seems to us that we should be recreant to that duty, if we should permit the form in which a State Court expresses its conclusions to override the necessary effect of its decision."

In the case of Yazoo & Miss. Valley R. R. Co. vs. Adams, 190 U. S. page 1, the Federal Constitution was not mentioned in the pleadings nor in the opinion of the Court, and does not appear to have been expressly raised otherwise than by a statement of the facts of the case, as appears from the opinion of this Court, as follows:

"Manifestly, that Court could not have held the railway liable for the taxes in suit without deciding either that the provision of Sec. 21 did not constitute a legal contract in view of the Constitution of 1869, or that no such contract existed in favor of the plaintiffs in error in view of the consolidations, or that the subsequent tax legislation of the State of 1892 and 1894 did not impair the obligation of that contract. All these were Federal questions, the vital one being whether the acts of 1892 and 1894 impaired the obligation of the contract, if any existed.

"In short, the case is one of those frequently arising under the second clause of Rev. Stat. Sec. 709, in which the validity of a State statute under

the Constitution of the United States is necessarily drawn in question, and, the decision of the State Court being in favor of its validity, this Court will take jurisdiction, though the Federal question is not specially set up or claimed. As we have repeatedly had occasion to hold, it is only in cases arising under the third clause of the section, where a right, title, privilege, or immunity is claimed, that the Federal question must be specially set up."

THE OPINIONS OF THE COURTS.

It is well settled by this Court that the opinions of the Court may be looked to in determining whether or not a Federal question was raised and decided.

> Murdock vs. Mayor, etc., of Memphis, 87 U. S. 590.
> San Jose Land & Water Co. vs. San Jose Ranch Co., 189 U. S. 177.

The Court of Chancery Appeals.

Under Chapter 76 of the Act of 1895, the opinions of the Court of Chancery Appeals are made part of the record.

Mr. Justice Wilson delivered the opinion of the Court of Chancery Appeals, and, after reviewing the pleadings at length, said:

> "If this Act of 1881, authorizing the Trustees of the Academy to lease its property to the Winchester Normal College is constitutional, and the subject matter of the Act was under the control of the State, the case, in our opinion, is at an end, so far as the right of complainants to maintain this suit is concerned.

And again:

> "The writer is very much inclined to the opinion that the State had the power to dispose of the property of this Academy, or the authority to authorize its lease, as was done under the Act of 1881 referred to, for any legitimate educational end. I would certainly so hold, if the question, as an independent one, were free from the weight of the decision of the Supreme Court of the United States in the Dartmouth College case."

The Court then reviewed briefly the case of the Trustees of Dartmouth College vs. Woodard, in 4 Wheaton. Referring to that case, Mr. Justice Wilson said:

> "It seems that the Supreme Court of the United States in that case, were of the opinion that an insti-

tution organized and chartered for educational purposes, was a private corporation, and being such, was a contract between the State and the incorporators, **and as such protected by the clause of the Federal Constitution inhibiting legislation impairing the obligation of contracts.**"*

And again:

"It seems to us that the principle of this case, which is sustained by numerous other authorities, settles the law that, although Carrick Academy was incorporated by the State, and the State appointed its first Trustees, and although the State may have made donations to it for the purpose of enabling it to carry out the educational ends of its creation, it was still a private corporation, and, therefore, exempt from a diversion from its original charter purposes by legislative action. We are, therefore, of the opinion that it was not competent for the Legislature to authorize the Trustees of Carrick Academy to absolutely suspend its functions as a corporation, and to practically dispose of its properties to another institution, although educational, but operated for private gain."

R. pp. 32, 33, 34.

Counsel for defendants in error make an ingenious argument with reference to the discussion of the Dartmouth College case by the Supreme Court, in which they insist that this case was not considered by the Court with reference to the contract clause of the Federal Constitution, but only to determine the question as to whether Carrick Academy was a private or a public corporation, and that they were considering in this connection, the constitutionality of the act with reference to Sec. 8, Art. 11 of the Constitution of Tennessee, which prohibits the passage of any law for the benefit of individuals inconsistent with the general law of the land, and they were also considering that provision of the State Constitution which prohibits the passage of any law increasing or diminishing the powers of corporations by special laws. Mr. Justice Wilson very effectually dssposes of this insistence

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by his opinion. He refers to and sets out the Act of 1840, which provides that academy property shall not be used by any college in the state. And then the opinion recites:

> "This Act of 1840, it appears, was in force when the Act of 1881 was passed, under which the trustees of the academy purported to lease its property to the Winchester College. Counsel for complainants make a point **in this connection** that the act of 1881 is a law **for the benefit of the Winchester Normal College,** to the end that 'it was using academy property for college purposes.' The article of the Constitution said to be violated by this act **in this respect** is Sec. 8, Art. 11, which provides:" (The. opinion. then quotes the constitutional provision in full).

The Court held, however, that the whole question turned upon the other question it had theretofore discussed, and held the act to be unconstitutional for the reason stated.

Here it is distinctly shown that the Court of Chancery Appeals considered two questions. First—The validity of the Act, with reference to the contract clause of the Federal Constitution, and considering that question, they held Carrick Academy was a private corporation and, under the principles of the Dartmouth College case, its charter created a contract, and that the General Assembly of Tennessee was without authority to authorize the diversion of its funds.

Second—They also considered the question which was raised by counsel for complainants, as to whether or not the act was void because it attempted, by special legislation, to grant special immunities to the **Winchester Normal College**, in this that the Act of 1840 inhibited the use of academy property by colleges, and that this Act of 1881 attempted to confer the special privilege upon the **Winchester Normal College** to take and hold academy property in violation of the Act of 1840; and that this Act of 1881 attempted to increase the power of the **Winchester Normal College,** so as to confer upon **it** the right to use academy property, which right it had not there-

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tofore had, and which right had not been conferred upon like corporations in the State.

It will readily be seen that this provision of the Constitution set out in complainants' bill and referred to in the opinion of the Court of Chancery Appeals did not apply to the Carrick Academy, nor was the question of whether Carrick Academy was a public or private corporation involved in the discussion of this question, because if the Winchester Normal College was prohibited from holding or using academy property, the prohibition would be just as effective in the one case as in the other. In other words, if the Normal College was prohibited from using academy property, the question as to whether the academy property was **public** or **private** could make no difference. So that it is futile to attempt to argue that, either the Court of Appeals or the Supreme Court were considering the Dartmouth College case or the question as to whether the Carrick Academy was a public or private corporation with reference to this provision of the State Constitution, above quoted.

The Opinion of the Supreme Court of Tennessee.

The Court of Chancery Appeals having held that Carrick Academy was a private corporation, and that under the principle of the Dartmouth College case, it was "protected by the clause of the Federal Constitution inhibiting legislation impairing the obligation of contracts", defendants in error appealed to the Supreme Court of Tennessee.

The learned Chief Justice of that Court, in his opinion said that the controlling question was whether this was a private or public corporation. In his opinion he referred at length to the cases of:

Governor vs. McEwen, 5 Humphrey 241.

Mobile School Commissioners vs. Putnam, 44 Alabama 506.

Heard vs. Curators of Mo., 47 Mo. 224.

In all of these cases, the controlling question was whether or not the legislation complained of had impaired the charter rights of the corporation, and whether the charters of these corporations were contracts protected by the contract clause of the Federal Constitution under the principle of the Dartmouth College case. The learned Court then reviewed the Dartmouth College case, and said:

> "Upon these facts it was held that Dartmouth College was a private eleemosynary corporation, and that its charter was 'plainly a contract, to which the donors, the trustees and the Crown (whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration; it is a conract for the security and disposition of property; it is a contract on the faith of which real and personal estate have been conveyed to the corporation; **it is then a contract within the letter of the Constitution.**' " *
>
> "It is easy to see that the corporation styled 'The Trustees of Carrick Academy' finds no analogy to the one that was the subject of consideration in that case. So it is upon principle as well as authority that we hold that this corporation was a public agency, under the control of the State, and that the Act of the Legislature under which the lease of its property to the Winchester Normal College was made in 1881, was constitutional."
>
> R. pp. 35-43.

So that in both courts the decisive question considered and determined was whether the Act of 1881 impaired the contract clause of the Federal Constitution.

To show conclusively that counsel for complainants in error did insist upon this question before the Supreme Court, we quote again from the opinion of the Chief Justice, as follows:

> "The Court of Chancery Appeals adopted the view insisted upon by the complainant, and rested

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their conclusion upon the authority of the case of the Trustees of Dartmouth College vs. Woodard, 4 Wheaton 519."

While there are many other questions made as to the validity of this lease, and as to the validity of the Act authorizing the lease, and it is possible that the Court might have decided the case **in favor of** plaintiffs in error upon some of these other questions, still, it could not have decided the case **against them,** without deciding **all** the questions against their insistence, including which was this Federal question. In other words, the consideration of this Federal question was absolutely necessary to the decision of the case **against** the plaintiffs in error.

Right Claimed Under Act of Congress.

As heretofore shown, the bill sets out in detail the history of the origin of this academy and the trust fund created for it by the Act of Congress of 1806, which Act was specially set up and the right claimed thereunder, in the bill.

The insistence of defendants in error is and has been that this Act of Congress really conveyed the property to the State, and that by virtue of this Act, the State became the owner of the fund arising from the sale of this property, and that the academies endowed therewith were State agencies for this reason. Plaintiffs in error insisted that the State was only made a **trustee**, and that the fund was intended for Carrick Academy, and that the endowment of Carrick Academy with this fund did not make it a public corporation or State agency. The Supreme Court adopted the view of the defendants in error, and construed this Act of Congress according to their insistence. This was necessary to the decision of the case, as it was decided. And hence a Federal question arises.

Glascow vs. Baker, 128 U. S. 560.
Neilson vs. Lagow, 7 Howard 771.
Joplin vs. Chachere, 192 U. S. 94.
Shiveley vs. Bowley, 152 U. S. 1.
Kennedy Mining Milling Co. vs. Argonaut Mining Co., 189 U. S. 1.

DID THE ACT OF 1881 IMPAIR THE CHARTER RIGHTS OF CARRICK ACADEMY.

It is insisted by defendants in error that this Act did not impair the charter rights of Carrick Academy, because, it is insisted, the corporation already had the right to make this lease under its charter. This power, it is insisted, is contained in that part of the second section of the charter, which reads as follows:

"2. Be it enacted, That the trustees of each of said academies, and their successors, by the names

aforesaid, shall be capable in law to purchase, receive, and to hold to them, and their successors, forever, any lands, tenements, rents, goods or chattels, which shall be given or devised to, or purchased by them for said organization; and to sell and dispose of the same in such manner as to them shall seem most advantageous **for said academies.**"

By inadvertence, the last clause above quoted was omitted in the copy set out in our original brief in this cause, at page 2, and the latter part of the clause,—**for said academies**—was also inadvertently omitted in the copy set out in the brief of defendants in error, at page 15.

It is manifest that this provision of the charter did not authorize the lease here complained of, for two reasons: First—Because this provision of the charter clearly contemplates that the property is to be held for the use of the academies—"as to them shall seem most advantageous for said academies"; and it is not pretended that this lease to the Winchester Normal College, a private corporation, with which the Carrick Academy had no connection, could posibly be of any advantage to Carrick Academy, or the trusts for which it was created. The bill charges and the demurrer admits, that the Winchester Normal College was used for the **personal advantage** of defendant Clark alone and not for the benefit of the people or the youth of Franklin County. Second—It is too clear for argunent that the charter did not authorize the trustees to convey this property to **themselves.** The bill charges that the trustees of Carrick Academy were also the trustees of Winchester Normal College; and clearly there could be no exercise of discretion in a contract between two institutions having the same trustees. A so-called agreement between the two would be of course a farce; and the conveyance by these trustees of Carrick Academy property to another private corporation of which they were trustees, without consideration, for a period of fifty years, was so manifestly a breach of their trust, and so clearly illegal, that they did not attempt it without express legislative authority, which on its face authorized them to take over their trust property

and convert it to their own use, or which was the same thing, to the use of a private corporation, of which they were trustees. Indeed, the very lease itself shows that these trustees clearly understood that they had no right to convey this property to their own corporation except by virtue of this act we are complaining of. The lease begins by reciting the Act of 1881 and setting out its terms. It then recites the incorporation of the Winchester Normal College, and names its trustees, and then states:

> "And whereas, the Board of Trustees of Winchester Normal College, by resolution, have agreed to accept the lease provided for in said Act upon the terms and conditions prescribed therein * * *

And again:

> "We, the undersigned, as trustees of Carrick Academy, and in pursuance of the power vested in us by said Act, do hereby lease to the trustees of the Winchester Normal College, for the period of fifty years, the academy property belonging to Carrick Academy * * *"

After describing the property, the lease concludes:

> "And it is intended that this lease shall be as full and effective as is authorized by said Act, **but no further or otherwise.**" *

R. pp. 14-15.

From this it will be seen that the trustees expressly stipulated that they only took the property over to themselves under and by **virtue of the authority of this Act, and not** otherwise.

It is next insisted that the statute did not act upon the contract; that it only **authorized** the corporation to do a certain thing, and that the doing of that thing depended upon the will of the corporation Manifestly the act affected the rights of the corporation as clearly as if it had been an act

* Bold face type is ours.

authorizing the directors of a private business or trading corporation to convert the fund in their keeping to their own use. We submit that an act authorizing agents to convert to their own use, their principal's property, is **not** an act authorizing the **principal** to dispose of his property, on the theory that the agent acts for the principal.

But it is insisted that this act was assented to and acted upon by the corporation.

As a matter of fact, it was not, because, as we have before argued, the **corporation's** interests were not considered or provided for, either in the act or in the lease. The **trustees** interests were provided for in both, but where the trustees and the corporation have antagonistic interests, the action of the trustees cannot be said to be the action of the corporation, in such a way as to be binding on it in a court of equity.

The rule is stated in **Perry on Trusts (4th Ed.) Vol. 1, Sec. 207,** as folows:

> "It is said that contracts of trustees are of two classes. One class consists of contracts made by trustees with themselves, or with a board of trustees or directors of which they are members. These contracts are void from the fact that no man can contract with himself. If, therefore, a board of directors should convey all the property of the corporation to themselves, the conveyance would be void without any inquiry into its fairness, or whether it was beneficial to the corporation or not.
>
> "And the same rule applies if a board of directors convey the property of a corporation, or any part of it, to any one of their number, he being one of the trustees negotiating and contracting with himself. And the same rule was applied where the trustees of one corporation, being trustees of another corporation, conveyed the property of one corporation to another, although there was a decree of Court."

But even if the trustees had no interest in the Winchester Normal College, still they had no authority to assent or

agree to the transfer of this property for any purpose other than that provided in the charter under which they were acting.

The trustees are not the owners of the corporation or its funds. Their rights and powers are limited by the provisions of the charter under which they act. The real owners are the beneficiaries contemplated by the charter and the donors, who have contributed to the corporation upon the faith of the pledge of the State contained in the charter, that the corporation should exist **forever** and **forever** devote the property of the corporation to the purposes of the trust. It is well settled that the State cannot impair this trust. It is also well settled that the trustees cannot do so, and courts of equity have inherent power to protect the trusts and remove unworthy trustees when they attempt to divert the funds of the trust to uses other than that provided for in the charter, or in any manner attempt to destroy or impair the rights of the beneficiaries. Then, if neither the State nor the trustees have the power to divert this fund or to convey the property for a purpose other than that provided for in the charter, can it be said that the State may lawfully authorize the trustees to do so, and that the two powers combined may absolutely destroy the rights of beneficiaries and suspend the functions of the corporation?

It is well settled that they cannot.

This same question was involved and decided in the case of the **State vs. Adams, 44 Missouri 570.** In discussing the case, the Court said:

> "But in charities, the corporators are not owners of the fund, neither is it held for their use. Their consent would not affect their own property, but that of others, and their office of visitors, so far from giving them power to authorize any change in its management and control contrary to the will of the founders, imposes upon them rather the obligation of seeing that that will is made paramount."

And again:

"But on the other hand, if the general power of consent is lodged in the directors or curators, there is no security whatever in eleemosynary grants. The founder may recall or change the character of his gift. even after contributions to swell it have been made by others, or the directors of the corporation administering it may fancy they have a better way, or may be personally interested in another mode. The State can do nothing alone; the directors can do nothing alone (1 Watts & Serg. 36; 1 Burr 201); but, by their joint action, the whole character of the foundation may be changed. Our observations show the ease with which legislative action is sometimes had, and it seems to me that the dangers to all charities—their great liability to perversion, if such changes are permitted—are more to be dreaded than the inconvenience of the restriction."

The same question was involved in thec ase of the **Board of Education vs. Bakewell, 122 Illinois, page 339.** In that case the Court said:

"It would seem to be supposed, here, that the corporation and the legislature together had the right of absolute disposition of this corporate property. But there are other rights and interests than these involved. Appellant is but a trustee of this property, to hold and administer it for the special purposes named in its charter, the education of teachers or the common schools. The benefactions were devoted by the donors to this special purpose, and be applied to no other. Appellant stands here as representing the donors, and their rights are to be defended and maintained by it. And so with respect to those who are to derive learning from this source, appellant is a trustee for them also. Religion, charity and education are, in the law, legatees or donees, capable of receiving bequests or donations in this form. (Dartmouth College vs. Woodard, 4 Wheaton 643). Before the Courts it will not not be suffered that there shall be any abuse of the trust, and it will be seen to that the property shall not be diverted from the object to which it was devoted by the don-

ors. To take this property in question from the Board of Education of the State of Illinois and give it away to Julian A. Bakewell, would be a clear perversion of the trust upon which the property is held."

In the case of **Allen vs. McKean (1 Sumn. 276) 1 Federal Cases No. 229,** page 489, Judge Story held that the visitorial power of the founder was vested by the charter, in such corporations as this, in the trustees, and discussing this visitorial power, he said:

"But what is the nature and extent of this visitorial power? Is it a power to revoke the gift; to change its use; to divest the rights of the parties entitled to the bounty? Certainly not. It is a mere power to control and arrest abuses and to enforce a due observance of the statutes of the chartiy."

And again, in discussing the question we now have in hand:

"But if the acquiesecence of the board could be construed into an approval of the act (as I think it ought not to be) still that approval cannot give effect to an unconstitutional act. The legislature and the board are not the only parties in interest upon such constitutional questions. The people have a deep and vested interest in maintaining all the constitutional limitations upon the exercise of the legislative power; and no private arrangement between such parties can supersede this."

No case has been cited to the contrary. The opinion of the Court in the **Pennsylvania College Cases, 80 United States page 190, cited** by adversary counsel, is not in conflict with our insistence. In that case the Legislature had reserved the right to amend, alter, or modify the charters of the corporations in question, and the act of consolidation complained of did not attempt to divert the fund or change the purpose for which these corporations were created. The Court said:

"The act of the Legislature uniting the two colleges did not contemplate that either college, as an in-

stitution of learning, should cease to exist, or that the fund of either should be converted to any other use than that prescribed in the original charters. All that was contemplated by the act in question was that the two institutions should be united in one corporation, as requested by the friends and patrons of both, that they might secure greater patronage and be able to extend their usefulness and carry out more effectually the great end and aim of their creation."

And again:

"Decided cases are referred to in which it is held that the trustees of such an institution where the the terms of the charter amount to a contract, and the charter contains no reservation of a right to alter, modify or amend it, cannot assent to any change in the charter made by the Legislature which contemplates a diversion of the funds of the institution to any other purpose than that prescribed and declared in the original charter."

The conclusion of the Court on this subject was:

"Nor can it be doubted that the assent of the corporations is sufficient to render such legislation valid, **unless it appears that the new legislation would have the effect to change the control of the institution or to divert the fund of donors to so some new use inconsistent with the intent and purpose for which the endowment was originally made.'**

And again:

"They did not pretend that the effect of the new legislation would be to lessen the influence and usefulness of the colleges, or to divert the fund to a different purpose from that which was intended by the donors, nor that it would have the effect to change the character of the institution from the original purpose and design of its founders."

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* Bold face type is ours.

REPLY TO THE ARGUMENT THAT CARRICK ACADEMY IS A PUBLIC CORPORATION.

Counsel for defendants in error, in their brief, have not attempted to controvert the proposition insisted on in our original brief, in this cause, and so thoroughly sustained by the authorities—that a public corporation is one:

(a) That is chartered for the government of some political division of the State—some governmental agency, or,—

(b) Whose property is owned exclusively by the State.

The argumen tof counsel seems to be that this is a public corporation because the state was the **exclusive owner of its property,** as it certainly cannot be argued, and was not, that the corporation was vested with any **governmental powers.**

In making this insistence, adversary counsel assume, in the face of all the authorities to the contrary, that the State was the founder of this institution, because, under the compact with the general government, it sold a part of the public lands, and devoted the same to the use of this and other academies. Assuming for the present that this was a direct gift from the general government to the State of these public lands, and that the State made a direct gift of the proceeds of the sales of the lands to the academy, it has been held in numerous cases, cited in our original brief, that the endowmen tof a corporation by the State did not create same a public corporation, or make the State the owner of its property.

Trustee vs. Bradbury, 11 Maine 118.
Yarmouth vs. North Yarmouth, 34 Maine 114.
Downing vs. Indiana State Board, 12 L. R. A. p. 664.
Regents of University of Maryland vs. Williams, 9 Gill & J. 365.
Cleveland vs. Stewart, 3 Georgia 383.
Trustees of Dartmouth vs. Woodard, sup.
Allen vs. McKean, supra.

The argument is made, however, that if the State created a public institution of its own—a State agency, and private individuals voluntarily contributed to this agency, it would be a gift to the State, and not a contract that the donation should be devoted forever to the purposes of the institution. In all this counsel **assume** that the charter created a public agency of the State and not a private corporation. This must be settled by the terms of the charter itself. Does it create a contract? Does it provide that its property shall be the **State's** property, or the property of the **corporation?** Does it, in terms, or by implication, **reserve to the State** the right to terminate the corporation's existence and assume control of its property?

The second section of the charter, which has herein before been quoted, provides that said academy "shall be capable in law to purchase, receive and hold to them and **their successors forever** any lands, tenements, rents, goods or chattels which shall be given or devised to or purchased by them for said academies."

Here is an express contract that said academies shall have the power to acquire and hold property **forever** for the use of said academies.

There is no reference to any endowment from the State, or from the United States **in the charter.**. Whatever gifts the State contemplated bestowing on these academies, was a matter for future consideration, and when bestowed, would be a gift **to the use of the corporation forever,** under the express terms of its charter.

It was not, as insisted by adversary counsel, founded by the public fund provided either by the State or the United States.

These charters created academies in various counties, in the State, to be endowed, sustained and supported by the people of their respective counties, as appears from the terms of the charter. It was doubtless intended that these academies

should be asisted by the trust fund provided by the Federal government. This is shown by the Act of Congress and the legislative history of the State. But the people of the various counties were the real founders. Sec. 3 of the charter provides:

> "Be it enacted, That the said trustees shall have the power to fix and purchase a site for these academies, and **to take and receive subscriptions for paying for the same,** as well as for the purpose of erecting buildings thereto." *

This section then provides for suit to be brought against any subscribers who fail to pay their subscriptions, etc. Clearly it was contemplated that the site was to be purchased by private subscription by the people in the locality where the academy was situated.

And these subscriptions were made, and all donations were made upon the faith of the solemn contract of the State that the academy should exist **forever,** and that its property should be forever devoted to the purposes of the trust.

This provision in the charter empowered the **corporation** to hold property, and we submit settles the question that this property was not intended to be **State** property, but was to be **forever the property of the academy,** and this is true, regardless of how great a proportion of its funds came from the State. The **contract** pledges the faith of the State to all proposed donors, and to the corporation itself, that the State will never interfere with the corporation, and will protect it forever in its corporate functions.

In Regents of University of Maryland vs. Williams, supra, the Court said:

> "The extent of the property or funds it may have owned by donation or otherwise is not material. **The capacity expressly given to acquire and hold property in perpetuity** for the use and purposes of its institution is the same thing, **so far as it concerns its**

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character as a corporation, as the actual acquisition of it would be."*

We will now briefly review the cases cited by defendants in error in their brief.

We call the Court's especial attention to the fact that in **not one of these cases are charters considered which provide for private donations upon the faith of a provision that the corporation shall hold its property forever.** . . . . . .

In **Trustees vs. Winston, 5 Stewart & Porter, 17,** there was no attempt in this case to divert the funds of the corporation. No provision in the charter is shown, authorizing it to exist and hold its property forever. The Court said:

> "No citizen has contributed one cent, either in money, property, labor or services."

In **Mobile School Commissioners vs. Putnam, 44 Alabama 506,** the commissioners held the property for the public schools supported by public revenues, and wholly under the control of the state. No provision was contained in the charter that this property should forever be the property of the commissioners or that the same should forever be devoted to the trust. The Court said:

> "Is it reasonable to presume that the legislative body by which that act was passed, supposed they were committing to a mer private corporation, for all time to come, the great trust of the public education for so important a portion of the people of Alabama, and that, too, in such a way as to put it beyond the care and control of legislative authority." * . . * A fair intrpretation of the whole act itself shows no such purpose or intention was contemplated."

And again:

> "The legislature retained the power to alter, amend, perfect or repeal the same, as might in the future be thought best for the public good."

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In that case it was not attempted to divert the fund, but only to change the manner of its administration.

Head vs. Curators of the University of Missouri, 47 Missouri, page 220.

This case merely involved the right of a professor to recover his salary after he had been removed by an act of the legislature. The Supreme Court of Missouri held that the curators of the university were not a private corporation, and under the facts stated, there certainly was not an element of a private corporation shown. No provision that they should exist forever as a corporation or that the property intrusted to the corporation should be forever devoted to the purposes of the trust, was made. The case was brought to this Court by writ of error, and decided in **86 United States, 526.**

In this Court the construction of the charter was not involved, nor was it insisted that the charter created a contract, but that the **employment** of the plaintiff created a contract, which, it was insisted, was violated by a subsequent act of the legislature declaring his position vacant. This Court held that the **terms of employment** contemplated the right of the legislature to terminate the employment, and that, therefore, no contractual rights were violated.

In **Thomas vs. Board of Trustees of Ilinois Industrlia University, 71 Illinois** 310, the Court held a mechanic's lien could not be enforced against the defendant's property, because it was a state institution, and its property owned by the State. No provision of its charter is shown which created a contract. No provision that its property should be forever used by the corporation for its charter purposes. There was no question of a diversion of the trust fund or a violation of its charter rights involved.

Spalding vs. People, 172 Illinois, p. 48, was a criminal case, and incidentally involved the discussion of the same university considered in the Thomas case just cited.

In **Regents vs. Board of Education, 4 Mich. p. 215,** the university in question was endowed and supported altogether by funds arising "from taxes and other public revenues";; the State appointed the professors, and their salaries were paid out of the State treasury. The act creating the institution expressly reserved the right to the legislature to repeal. or to modify its charter.

In **Regents vs. McConnell, 5 Nebraska 423,** the fund wsa entirely public. The act creating this institution did not confer any of the powers of a private corporation. It was not given the power of perpetual existence, and no provision was made either for private donations or that the fund should forever be devoted to the use of the corporation. In that case the Court expressly recognizes the distinction upon which we rely, and held that in that case the whole fund belonged to the public.

In **State vs. Knowles, 16 Florida 575, no** provision was made in the charter for private donations. Nor for the perpetual existence of the corporation, or the applicaton of ts fund forever to the purposes of the corporation. On the contrary, the officers and professors were to be paid out of the public funds; and no provision of the charter was shown to have been violated and no attempt made to divert the fund, but only to change the trustees who were to administer same.

In Governor vs. McEwen, 5 Humphrey 240, no contract was made in the charter that the corporation should exist forever, or that its funds should be forever held and used by the corporation. Among other things, the Court said:

> "It is not an attempt to divert the fund to improper uses, but merely surrender of a portion, in order to secure the balance."

This was entirely a **public fund** for common school education, and no provision of an alleged charter was violated. Again the Court said:

> "This constitutes an important difference between public and private corporations. The one is

> completely under the control of the legislature, and the other is not, because it is the creation of a contract between the State and private individual or individuals, which cannot be interfered with, without violating that provision of the Constitution which preserves the obligation of the contract."

Not one cent of this fund was ever contributed by private individuals. It came from the State and was owned by the state.

It will thus be seen that none of these cases have the slightest bearing on the question in controversy.

Adversary counsel attempt to draw a distinction between the case at bar and the case of **Vincennes University vs. Indiana, 14 Howard 269,** because in that case the act of Congress reserved, and the Secretary of the Treasury located, the property for the university, which was **afterwards** chartered and brought into being by the Territory of Indiana, and empowered by this charter of the State to take and to hold this property. Whereas, in the case at bar the act of Congress provided that the State should dispose of the property provided for the academy and sell the same for not less than two dollars per acre, and "the proceeds of the sales of the lands aforesaid shall be vested in funds for the respective uses aforesaid forever."

In the Vincennes case, the government set apart and selected the property and the State created the corporation and gave it power to hold and use the same. In the case at bar, the government conveyed the property in trust to the state, under an express contract that the state should sell the same and devote the proceeds to the use of the academy forever. We submit there is no essential difference between the principle involved in the two cases.

In the case of **Board of Education vs. Greenbaum, 39 Illinois 609,** and the **Board of Education vs. Bakewell, 122 Ilinois 339,** cited and discussed in our original brief, the title to the property ceded by the United States government had

been vested in the State and by the State sold, and the funds used for the benefit of the university, as provided for in the compact with the Federal government. And in that case it was held that this merely created a trust in favor of the university.

Adversary counsel attempt to distinguish these case from the case at bar by insisting that the university was originally established under its charter with **private funds,** and that as it was, **in its inception,** a private corporation, its character was not changed because the legislature afterwards contributed a part of this public fund to it.

The opinion of the Court in the first case shows that the compact with the Federal government was in 1818, and the corporation was not chartered until 1857. So that, at the time the corporation was brought into being, the fund that the state held in trust for it, was already in existence, just as in the case at bar Congress had passed the act, ceding the land to Tennessee for the use of this and other academies, but the Legislature had made no appropriaton and had passed no act for the benefit of these academies when this charter was granted. The charter on its face makes no provision for any endowment other than it provided for private donations and private subscriptions. So that in this case the corporation was, **in its inception,** purely private, without any provision having been made by the state for its endowment out of any public fund.

It is also insisted by counsel that in the case of **Downing vs. State Board of Agriculture of Indiana, supra,** the state had made no appropriation whatsoever for the corporation. Counsel overlook the fact that Sec. 8 of the charter of that corporation appropriated one thousand dollars from the State treasury for its support. And that the litigation was to recover appropriations made by the state for the benefit of the corporation. Thus that corporation was endowed and supported by appropriations from the State, and yet held to be a private corporation.

While counsel attempt to draw distinctions between the particular facts involved in the **Dartmouth College Case**, and the case at bar, the fact remains that the principles settled in that case are controlling in this case:

(a) That a public corporaion is either a governmental agency, chartered for political purposes, such as municipal corporations, or else one in which the State owns all the interests.

(b) Where the State charters a private eleemosynary institution, and provides that it shall exist forever, with the right to take property by private donation and by purchase, and hold the same in perpetuity,—this creates a private corporation, and a contract between the state and the **corporation,** and a contract between the state and the **donors**, and a contract between the state and the **beneficiaries**, that the corporation shall exist forever and **perpetually devote its property to the trusts provided for in the charter.**

In conclusion, we desire to call the attention of the Court to the case of the **Trustees of Montpelier Academy vs. George, 14 Louisiana 395.**

In 1883 the Legislature of Louisiana passed an act incorporating complainant, and appointing certain named persons as trustees. The act provided that the corporation should have authority to acquire properey by donation, purchase, etc.

The act provided also that the state should appropriate twenty-five hundred dollars per year for said academy. It also provided that the funds that had theretofore been appropriated for primary schools in the parishes of St. Helena and Livingston should be paid to the trustees of the corporation. The question as to whether the state could control this corporation was involved. The Court discussed very fully the difference between a public and private corporation, and after stating that the school building of the academy had been donated by one I. T. Preston, said:

> "The state stipulated with him through these trustees that his gift should inure to the benefit of the

academy and forever be administered by the persons named in that act or their successors, chosen as therein provided.

"It was clearly a contract entered into between the donor and the trustees, for the transfer and **perpetual security of the property, under the plighted.... faith of the state.**" *

The Court held that was a private corporation, and that the principles of the Dartmouth College case were in harmony with the principles of both the common and the civil law.

Respectfully submitted.

FLOYD ESTILL,
JESSE M. LITTLETON,
JAMES J. LYNCH,
Attorneys for Plaintiffs in Error.

ISAAC W. CRABTREE,
FELIX D. LYNCH,
Of Counsel.

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